85-1791

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DARLENE K. THOMAS

PETITIONER

vs.

CRAIG WILLIS, FRANCIS N. HAMBLIN, ROBERT STORCH, CHARLES DE SANTO, JOHN ZAHARIS, HUGH WILLIAMSON, CHARLES KENT, PAUL KLENS, AND THE ASSOCIATION OF PENNSYLVANIA STATE COLLEGE AND UNIVERSITY FACULTIES

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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56 pp

QUESTIONS PRESENTED

1. Whether the Supreme Court's rule of uniformity regarding the statute of limitation in 42 U.S.C. § 1983 cases and its retroactive application counters the petitioner's right of due process.

2. Whether Wilson v. Garcia, __U.S.__, 105 S.Ct. 1938 (1985) has been uniformly applied by the circuit courts and within the circuits.

3. Whether the stated tests concerning retroactivity in § 1983 cases as set forth in Chevron Oil v. Huson, 404 U.S. 97 (1971) applies to the petitioner's appeal and thus supports a prospective approach.

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JURISDICTIONAL STATEMENT

Nature of proceeding

The petitioner, Darlene Thomas, respectfully prays that a writ of certiorari be issued to review the judgment of the U.S. Court of Appeals for the Third Circuit entered on February 20, 1986.

Opinions in Lower Courts

The Court of Appeals, Third Circuit affirmed the judgment of the district court on February 20, 1986 dismissing the case on the grounds of timeliness applied retroactively. (The Order is copied and appears as Appendix A).

The United States District Court, Middle District of Pennsylvania entered its decision on June 24, 1985, dismissing the case as time-barred because of the retroactive effect of Wilson v. Garcia. (The Order is copied and appears as Appendix C.)

Jurisdiction

On February 20, 1986 the U.S. Court of Appeals, Third Circuit entered judgment affirming the U.S. District Court Order to dismiss the case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V:

> Nor shall any person...be deprived of life, liberty, or property, without due process of law...

United States Constitution, Amendment XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On September 4, 1980, the petitioner was fired from her position as a tenured professor at Lock Haven University without prior notice and without being afforded the opportunity to present her position.

On February 6, 1984, the petitioner filed a complaint that was timely at the time of filing in the United States District Court, Middle District of Pennsylvania. A six year period for filing § 1983 cases was established law as indicated in the June 4, 1985 Order of the district court concerning motions to dismiss. (The Order is copied in part and appears as Appendix B.) A series of motions by the defendants caused a delay in the case for one year.

In February 1985, the defendants moved for summary judgment on various grounds, none of which included the issue

of statute of limitation. The magistrate recommended to the court, that summary judgment be denied as to the count alleging a deprivation of procedural due process, and granted the remaining counts. The litigants were in the process of filing motions and briefs relating to the magistrate's finding when the opinion for Wilson v. Garcia was issued on April 17, 1985. In response to that action, the defendants resurrected the issue of statute of limitation.

On June 24, 1985, the U.S. District Court granted the defendants supplemental motion for summary judgment and entered judgment in their favor. The district court held that in light of Wilson v. Garcia, the two year statute of limitation applied and should be applied retroactively. (The Order is copied and appears as Appendix C.) Having dismissed the case on grounds of timeliness, the district court did not

address the magistrate's report, including the finding of initial denial of due process.

On August 30, 1985, petitioner filed an appeal to the United States Court of Appeals, Third Circuit. An Order was issued by the Court of Appeals on February 20, 1986 affirming the district court's decision. (The Order is copied and appears as Appendix A.) The Third Circuit stated that a petition for Writ for Certiorari could be made.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Federal jurisdiction was vested in the lower court by virtue of 28 U.S.C. § 1343 (3) and (4) which provide for original jurisdiction in the United States District Courts of suits to redress deprivations under color of state law of any right or privilege secured by the Constitution of the United States, and 28 U.S.C. § 1331 which gives District Courts original jurisdiction to hear cases involving federal statutory and constitutional claims.

Appeal to the Third Circuit was pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S CONSTITUTIONAL RIGHT OF DUE PROCESS HAS BEEN VIOLATED BY THE RETROACTIVE APPLICATION OF THE RULE OF UNIFORMITY IN WILSON V. GARCIA.

In Wilson v. Garcia, __U.S.__, 105 S.Ct.1938, this Court ruled that all 42 U.S.C. § 1983 cases would be bound by a uniform statute of limitation. One reason offered by the Court for uniformity is its concern of equality for all persons promised in the Fourteenth Amendment which commands that no person be denied the equal protection of the laws.

It is unclear how retroactive application of the rule of uniformity can be construed as a concern for the equal protection of the law. At the time Wilson v. Garcia appeared, petitioner was in the

process of addressing a clear denial of due process as indicated by the magistrate's report to the U.S. District Court and by the district court's June 4, 1984 Order appearing in part as Appendix B. Petitioner's suit was timely according to the prevailing state laws at the time of commencing suit. The Third Circuit had clarified the timeliness issue in two cases appearing in 1983. Knoll v. Springfield Township School District, 699 F.2d. 137 and Perri v. Aytch, 724 F.2d. 362.

The Third Circuit in Knoll and Perri, the Tenth Circuit in Jackson v. City of Bloomfield, 731 F.2d. 652 (1984) and the Seventh Circuit in Beard v. Robinson, 563 F.2d.331 (1977); cert. denied, 98 S.Ct. 3125 (1978) had each ruled that comparable state law should be applied in civil rights cases, and each of the Circuit Courts applied statutes of limitation consistent with the state laws within their juris-

diction. The court rulings provided precedent upon which litigants and litigators relied heavily. In Wilson v. Garcia, this Court, without forewarning, changed the accepted law by issuing a uniform statute of limitation. The most jarring change of all is the retroactive application of the new statute of limitation.

In Winston v. Sanders the United States District Court of the Central District of Illinois argues the inequity of the change of law and its retroactive effect, and provides a list of a dozen cases in the state of Illinois alone demonstrating the reliance placed upon the longer statute of limitation (five years for Illinois). The district court in Illinois thus demonstrates that Wilson v. Garcia did change the law, particularly by its retroactive effect.

By changing the law and applying that change retroactively, the Supreme Court in effect has countered the petitioner's const-

itutional right of due process as asssured in the Fifth and Fourteenth Amendments of the United States Constitution. The April 1985 change of law removed the petitioner from the courthouse where it had already been submitted that she had suffered a denial of due process.

In sum, new law was established by Wilson v. Garcia and its retroactive application, which has resulted in a violation of petitioner's constitutional right of due process.

II. THE DISPARATE APPLICATION OF WILSON v. GARCIA BY THE COURTS HAS RESULTED IN AN INEQUITY TO PETITIONER.

In Winston v. Sanders, supra the United States District Court of the Central District of Illinois ruled that the plaintiff would receive an inequity under the law if removed from the courthouse by retroactive application of the two year statute of

limitation as set forth in Winston v. Garcia. Similarly, petitioner in the instant case would receive an inequity if this Court does not permit continuation of the suit. An added inequity would occur if plaintiff Winston were to receive prospective application while petitioner Thomas were subject to retroactive application as held by the District Court of the Middle District of Pennsylvania and affirmed by the Third Circuit.

An additional inequity to petitioner's case occurs in a recent ruling by the Sixth Circuit in Carruthers Ready-Mix, Inc. v. Cement Masons Local Union, 779 F.2d.320 (1985) in which a three year period of limitation was applied, thereby reversing a court ordered six month period of limitation. Carruthers relies upon the arguments presented in Wilson v. Garcia, but uses it to support the application of analagous state statutes of limitation

instead of a uniform two year period. Petitioner consequently is the victim of one interpretation of Wilson v. Garcia, while other litigants benefit from different court interpretations. It is clear that uniformity has not been achieved in the aftermath of Wilson v.Garcia.

In sum, the two purposes leading to this Court's decision for uniformity in Wilson v. Garcia have not been met. The first purpose was to provide equality of the law, although it is apparent that the retroactive effect has been detrimental to petitioner but not to the plaintiff in Winston nor the appellant in Carruthers. The second purpose of uniformity was intended as a means to reduce the number of lawsuits, but it appears that the district and circuit courts are interpreting and applying the ruling differently. The matter begs clarity since these variations are likely to stim-

ulate additional court proceedings. Disparate interpretations of the case have produced an inequity in the law, causing the petitioner in the instant case to be victimized while other litigants have not been adversely effected.

III. THREE TESTS IN CHEVRON OIL V. HUSON CONCERNING APPLICATION OF RETROACTIVITY APPLY TO PETITIONER'S CASE.

In Chevron Oil v. Huson, the Court holds that three factors must be evaluated in order to determine whether decisions are to be applied retroactively. Those three tests are:

> whether the decision establishes a new principle of law either by overruling clear past precedent upon which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; and
>
> whether the past history of the decision in question and its purpose and effect suggest that retroactive operation would further or retard its operation; and

> whether the equities and inequities imposed by retroactive application support retroactive application or not.

With regard to the first test, the Court, by retroactively applying a uniform two year statute of limitation in Wilson v. Garcia, established a new principle of law that overruled past precedent relied upon by litigants and in addition, decided an issue whose resolution was not clearly foreshadowed either by litigants or by litigators. Because the Reconstruction Civil Rights Acts do not contain a statute of limitation for actions brought under 42 U.S.C. § 1983, the courts had been instructed to apply the most analagous state statutes of limitations. Board of Regents v. Tomanio, 446 U.S. 478 (1980)

At the time petitioner filed the instant suit, the Third Circuit had adopted Pennsylvania's six year statute of limitation, 42 Pa. Cons. Stat. Ann. § 5527, for application in § 1983 actions alleging

unconstitutional termination of employment. Knoll v. Springfield Township School District, supra and Perri v. Aytch, supra. Knoll and Perri reaffirmed the Court's approach in civil rights appeals as held in Davis v. U.S. Steel Supply, 531 F.2d. 335 (3rd Cir. 1978); Skehan v. Board of Trustees of Bloomsburg State College, 490 F.2d. 470 (3rd Cir. 1978); and Meyers v. Pennypack Woods Home Owner's Association, 599 F.2d.894 (3rd Cir. 1977).

Relying upon this precedent, petitioner's suit was timely under extant law and was so ruled by the district court's June 4, 1984 Order, pertinent parts of which appear as Appendix B. Neither the fact that the suit was filed more than two years after injury, nor speculation for the reasons for so doing are relevant since it was timely filed according to Pennsylvania law as proclaimed by the Third Circuit. The issue of "sleeping on one's rights"

has been suggested in this and other cases, but this justification does not recognize the problems for a layman in knowing what the law provides, understanding the inherent legal concepts, finding a lawyer and seeking a second opinion. In the instant case, the petitioner filed suit more than two years after injury upon the advice of counsel who relied upon the six year statute of limitation in Pennsylvania clearly established by the Third Circuit in Knoll and Perri. The defendents delayed the case for more than a year by filing a series of motions, a tactic which allowed the case to still be pending when the April 17, 1985 decision of Wilson v. Garcia was issued.

In regard to the second test concerning the weighing of merits and demerits, both the Third Circuit in Smith v. City of Pittsburgh, 764 F.2d. 188 (1985) and the Tenth Circuit in Jackson v. City of Bloomfield, 731 F.2d. 652 (1984) were unable to

conclude if the policies in Wilson v. Garcia favored either retroactive or prospective application. The result of the rulings of the Third and Tenth Circuits is to take a neutral approach in regards to the second test. In Jackson v. City of Bloomfield, the Court declined to retroactively apply the new statute of limitations even if retroactivity were to further the concerns addressed in Wilson v. Garcia, because "this factor is greatly outweighed by the substantial inequity that would result".

In Winston v. Sanders, 610 F.Supp. 176 (1985), the Court rejected the retroactive application of Wilson v. Garcia, because to apply the rule retroactively would clearly "...retard rather than...support the values that inhere in that remedy." Accordingly, petitioner submits that prospective application is appropriate in the present case where she has satisfied the first and third tests of Chevron, and

where in respect to the second test, the values underlying the purpose of Wilson v. Garcia as interpreted in the preceding citations would be countered by retroactive application of the new statute of limitation.

The purpose of Wilson v. Garcia has been interpreted from a different perspective in Carruthers Ready-Mix, Inc. v. Cement Masons Local Union, supra. In this case the Sixth Circuit relied upon Wilson v. Garcia to support the application of analagous state law, and accordingly applied Tennessee's three year period of limitation. Carruthers is a labor case, and the Sixth Circuit's ruling reversed the lower court's application of the National Labor Relations Act § 10(b) six month limitation period. The reasoning of the Sixth Circuit is that although a rapid resolution of labor disputes is favored when the immediate situation involves a breakdown of the collective bargaining process, in Carruthers "No such

threat exists...as no labor relationship exists between the parties to this action".

Carruthers has particular meaning to the instant case which also deals with a labor issue, and one that refers to a past incident with no bearing upon the collective bargaining process. Thus the argument that a rapid resolution as a labor issue is moot in petitioner's case, following the reasoning in Carruthers. The Sixth Circuit's decision in this case applies to the merits of the instant case in that a longer state statute of limitation is considered more appropriate. The reasoning relies upon an interpretation of Wilson v. Garcia and supports petitioner's continuation of her case based upon the Pennsylvania six year period of limitation.

In regard to the third Chevron test, retroactivity is not applicable where the overruling decision produces inequitable results. Petitioner has expended a con-

siderable amount ot time, effort and money in the pursuit of the present case as evidenced in the affidavit appearing as Appendix D and by the fact that because her funds are depleted, she is economically forced to petition this honorable Court on a pro se basis. During 1985, petitioner paid 76.4% of her earned income for legal fees. In Jackson, the Tenth Circuit while considering the third Chevron test proclaimed that because the plaintiffs justifiably relied on precedent set by prior cases in concluding their suit to be timely, "it would be most unjust to hold that plaintiffs have slept on their rights, based on a change in the law occurring after their action was filed."

In sum, petitioner satisfied the criteria of the three tests set forth in Chevron, and accordingly qualifies for prospective application of the two year statute of limitation established in Wilson

v. Garcia as interpreted by some courts. If the Sixth Circuit's ruling in Carruthers Ready-Mix, Inc. v. Cement Masons Local Union is considered, then the Pennsylvania six year statute of limitation holds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 29, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.85-5462

THOMAS, DARLENE

vs.

WILLIS, Craig; HAMBLIN, Francis N.; STORCH, Robert; DeSANTO, Charles; ZAHARIS, John; WILLIAMSON, Hugh; KENT, Charles; KLENS, Paul; THE ASSOCIATION OF PENNSYLVANIA STATE COLLEGE AND UNIVERSITY FACULTIES

Darlene Thomas,
Appellant

Appeal from the United States District Court for the Middle District of Pennsylvania - Scranton
(Civil Action No. 84-0173)
District Judge: Honorable Malcolm Muir

Submitted Pursuant to Third Circuit Rule 12(6)
February 13, 1986

BEFORE; HIGGINBOTHAM and STAPLETON, Circuit Judges and TEITELBAUM, District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED and ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: Feb.20, 1986

* Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DARLENE THOMAS, Plaintiff	:	CIVIL ACTION No. 84-0173
vs.	:	(Judge Muir)
CRAIG WILLIS, et al., Defendants	:	(Complaint filed 2/6/84)

ORDER
June 4, 1984

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Plaintiff Darlene Thomas filed this lawsuit pursuant to 42 U.S.C. § 1983 for compensatory and injunctive relief. According to the complaint, Thomas was unconstitutionally deprived of her tenured employment as an Associate Professor in anthropology at Lock Haven University of Pennsylvania (hereinafter Lock Haven).

The complaint lists two sets of Defendants. The first set of Defendants includes Craig Willis, Francis N. Hamblin, Robert Storch, Charles DeSanto, John Zaharis, and Hugh Williamson. The aforementioned individuals were at all times relevant hereto employees of Lock Haven and will hereinafter be referred to collectively as the Lock Haven Defendants. The second set of Defendants includes the Association of Pennsylvania State College and University Faculties and two officers thereof, Charles Kent and Paul Klens. Hereinafter, the second group of Defendants will be collectively called the Association Defendants. The Association of Pennsylvania State College and University Faculties is a labor organization which was at all times relevant hereto the certified bargaining representative of a unit of employees which included Thomas.

When ruling on a motion to dismiss, all allegations in the plaintiff's complaint must be deemed true. In Count 1 of the complaint, Thomas alleges that she was discharged as an associate professor of anthropology employed at Lock Haven without procedural due process. In Count 2 of the complaint, Thomas alleges she was terminated in retaliation for her exercise of free speech while she was teaching an anthropology class. In Count 3 of the complaint, Thomas claims that pursuant to the collective bargaining agreement between the Association of Pennsylvania State College and University Faculties and Lock Haven , she possessed a liberty right in academic freedom the exercise of which brought about her dismissal. Thomas asserts that she was wrongfully dismissed on the above basis without due process. In Count 4 of the complaint, Thomas alleges that Defendant DeSanto

caused or participated in her termination because her religious beliefs differed from those of DeSanto in violation of the First Amendment. In Count 5 of the complaint which is directed solely at Defendant Klens, Thomas alleges that she was terminated in retaliation for her participation in protected speech critical of Klens' tenure as the local president of the Association of Pennylvania State College and University Faculties. In Count 6 of the complaint, Thomas alleges a pendent state law action claim that her summary dismissal was in violation of the Pennsylvania Administrative Agency Law, 2 Pa. Cons. Stat. § 101 et seq., because, inter alia, she did not receive a pre-termination hearing prior thereto.

The Defendants first seek to dismiss the complaint on the basis that Thomas's cause of action is time-barred. Because

Congress has regrettably and inexcusably established no statute of limitations governing actions brought pursuant to Section 1983, the Court must apply the most nearly analagous state statute of limitations. Board of Regents vs. Tomanio, 446 U.S. 478 (1980). The Defendants in support of their motion to dismiss argue that the most nearly analagous statute of limitations to Thomas's charges of wrongful discharge is the two-year personal injury statute of limitations found at 42 Pa.Stat. § 5524(2) described below. Defendants further argue that because Thomas's cause of action arose in September 1980 this lawsuit was not timely filed.

The Defendants' assertions are without merit. Section 5524(2) provides that a two-year statutue of limiations applies to any "action to recover damages for injuries to the person or for the death of an ind-

ividual caused by the wrongful act or neglect or unlawful violence of negligence of another." Section 5524(2) has been held to pertain only to actions arising out of personal injury or death. Davis vs. U.S. Steel Supply, 531 F.2d 335 (3d Cir. 1978); Myers vs. Pennypack Woods Homeowners Association, 559 F.2d 894 (3d Cir. 1977). Thomas does not assert that the Defendants' acts caused her either personal injury or death.

We agree with Thomas that the six-year residual statute of limitations contained in 42 Pa.Stat. § 5527(6) covers causes of actions brought pursuant to Section 1983 wherein the gravamen of the complaint is that the defendants have wrongfully discharged the plaintiff. We note that in at least one substantially similar lawsuit, the Third Circuit Court of Appeals has held that the six-year statute of limitations

contained in § 5527(6) covers causes of actions brought pursuant to Section 1983 wherein the gravamen of the complaint is that the defendents have wrongfully discharged the plaintiff. We note that in at least one substantially similar lawsuit, the Third Circuit Court of Appeals has held that the six-year statute of limitations contained in § 5527(6) applies to civil rights suits alleging wrongful discharge. See Perri v. Aytch, 724 F.2d 362 (3d Cir.-1983). Because we find that the six-year statute of limitations governs Thomas's lawsuit, the Defendants' motion to dismiss on the basis that Thomas's claim is time-barred will be denied.

The Defendants argue that Count 1 wherein Thomas alleges that she was terminated without procedural due process must be dismissed on the basis of the recent Third Circuit Court of Appeals decision in

Pederson vs. South Williamsport Area School District, 677 F.2d 312 (3d Cir. 1982). The Defendants assert that Pederson stands for the proposition that a post-deprivation arbitration proceeding such as that provided to Thomas after her termination satisfies the due process requirement of the Fourteenth Amendment. Defendants raise essentially the identical argument in support of their motion to dismiss Count 3 of the complaint wherein Thomas argues she was deprived of her contractual right to academic freedom without due process.

(CONTINUED)*

*The remaining portion of the Order does not relate to timeliness, or to due process.

/s/ Muir

MUIR,U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DARLENE THOMAS, Plaintiff	:	CIVIL ACTION No. 84-0173
vs.	:	(Judge Muir)
CRAIG WILLIS, et al., Defendants	:	(Complaint filed 2/6/84)

ORDER
June 24, 1985

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Presently pending before the Court are summary judgment motions filed by the Defendants. This case arises out of Plaintiff Thomas's discharge from employment as a professor at Lock Haven University on

September 4, 1980. Thomas claims under 42 U.S.C. § 1983 that the Defendants violated her right to due process of law by not affording her a hearing prior to her discharge and violated her First Amendment rights to free speech and freedom of religion in connection with her discharge. Thomas filed a grievance regarding the discharge and, after an arbitration hearing, the arbitrator upheld the discharge on February 4, 1982. The complaint in this case was filed on February 6, 1984.

The Defendants filed motions for summary judgment on February 1 and February 4, 1985. The Defendants sought summary judgment on a variety of grounds. The motions were referred to United States Magistrate J. Andrew Smyser for his report and recommendation. On April 22, 1985, Magistrate Smyser issued an exhaustive report on the motions recommending that

they be granted in part and denied in part. The parties thereafter filed exceptions to the Magistrate's report.

On April 17, 1985, the United States Supreme Court held in Wilson vs. Garcia, 53 U.S.L.W. 4481 (April 17, 1985), that the state statute of limitations for personal injury actions should be applied in all actions under 42 U.S.C. § 1983. Thomas concedes that under Wilson, Pennsylvania's two-year statute of limitations for personal injury actions would apply to this case and that the case would be time-barred. Thomas argues, however, that Wilson should not be given retroactive effect.

On June 12, 1985, the Court of Appeals for the Third Circuit issued an opinion addressing this precise question. Smith vs. City of Pittsburgh, No. 84-3501 (3d Cir. June 12, 1985). In Smith, the Plaintiff contended that he had been discharged from

employment by the City of Pittsburgh in violation of his constitutional rights. The City argued throughout the litigation that Smith's complaint was time-barred and that a two-year statute of limitations should apply to Smith's claim. The district court rejected this claim and held that because Smith's claim was most analogous to a state law claim of unlawful termination of an employment contract, the applicable Pennsylvania statute of limitations was six years.

When Smith reached the Court of Appeals, because the intervening decision of the Supreme Court in Wilson vs. Garcia would require application of Pennsylvania's two-year statute of limitations and therefore bar Smith's claim, the Court of Appeals considered whether Wilson should be given retroactive application under the three-part test set forth in Chevron Oil Company vs.

Huson, 404 U.S. 97, 106-107 (1971). The Court considered (1) whether Wilson established a "new principle of law" such that the decision should not be applied retroactively; (2) whether retroactive operation of the rule would further its operation and (3) whether retroactive application of the rule would produce substantial inequitable results. Smith, slip op. at 13-18. Although the Court of Appeals did not expressly answer the question, it appears to have concluded that Wilson vs. Garcia did not "establish a new principle of law," a factor which would counsel against retroactive application. Id. at 13-16. As to the second Chevron vs. Huson factor, the Court of Appeals concluded that although "... the policies referred to in Wilson vs. Garcia [do not] militate clearly in favor of retropsective application, neither do they militate against such application."

Id. at 17. See also Perez vs. Dana Corp., 718 F.2d 581, 588 (3d Cir. 1983) (giving retrospective application to a six-month statute of limitations for claims under § 301 of the Labor Management Relations Act).

Having concluded that neither of the first two Chevron vs. Huson factors counselled against retroactive application of the Wilson vs. Garcia rule, the Court of Appeals proceeded to consider whether retroactive application of Wilson vs. Garcia would be inequitable. The Court of Appeals stated that "...Plaintiffs in this Circuit...could not reasonably have relied on the assumption that a limitations period longer than two years would apply to their § 1983 claims based on termination without due process until our decision in Knoll vs. Springfield Township School District, 699 F.2d at 144-45, which was decided on January 27, 1983...." Smith, slip op. at

17-18. The Court of Appeals also noted that the City of Pittsburgh had consistently maintained that Smith's action was barred by the statute of limitations. Id. at 18. The Court held that Wilson vs. Garcia should be applied retroactively to Smith's claim and that the claim was therefore time-barred.

In our view, this case is virtually indistinguishable from Smith vs. City of Pittsburgh. The first two Chevron vs. Huson factors apply to this case in the same manner in which they applied in Smith. Consequently, this case would be distinguishable from Smith only if retroactive application of Wilson vs. Garcia would be inequitable. Thomas's discharge occurred on September 4, 1980. She does not contend and it does not appear to the Court that her claims arose at some time other than the date of her discharge. Thomas chose

not to file suit within two years of the date but she could not reasonably have relied on the applicability of a statute of limitations longer than two years. Thus, under the Chevron vs. Huson test applied by the Court in Smith, no exception to the general rule that a court should apply the law in effect at the time it makes its decision need be recognized in this case in order to avoid "...harsh, unjust or inequitable results." Smith, slip op. at 17.

The following argument that might be made on Thomas's behalf has occurred to the Court, although Thomas has not raised the argument herself. Even if Thomas could not reasonably have waited more than two years to file her suit, having done so and in light of the subsequent decision of the Court of Appeals in Knoll holding that a six-year statute of limitations

should govern a case such as hers, Thomas was entitled in 1983 to file suit in reliance on the decision in Knoll. Thomas could contend that it would be inequitable to apply Wilson vs. Garcia retroactively to bar her claim in light of her justifiable reliance in the Knoll decision and her subsequent expenditure of substantial time and effort to prosecute her claim. The Defendants respond to Thomas's expenditure of resources argument by noting that despite their consistent contention throughout this lawsuit that Thomas's claim is time-barred, the Defendants have themselves been forced to expend substantial resources in defending this action.

Acceptance of this argument would place Thomas in a better position than a Plaintiff such as Mr. Smith in Smith vs. City of Pittsburgh whose claim arose in 1980 and who filed suit after the two-year

limitations period ran but before the Court of Appeals' decision in 1983 in Knoll. As recognized by the Court of Appeals in Smith vs. City of Pittsburgh, the law regarding the statute of limitations applicable to claims such as Thomas's was quite unclear in this Circuit and throughout the nation at the time Knoll was decided. The Knoll decision itself consists of a lengthy discussion of whether a six-month statute of limitations would be consistent with the purposes of the Civil Rights Act. After concluding that the six-month statute of limitations was inconsistent with the Civil Rights Act, the Court stated in a single sentence that a six-year statute of limitations should govern:

> In addition, we conclude that Pennsylvania's residuary six-year statute of limitations, which applies in the absence of another applicable limitations provision, should govern this section 1983 action because it 'better serves the policies expressed in the federal statute.'

(citation omitted). The basis for the Court's holding was not explained. In the statement of Judge Adams regarding denial of the appellee's petition for rehearing, Judge Adams noted that the panel's decision was inconsistent with decisions reached by other courts of appeals and arguably inconsistent with United States Supreme Court precedent. Knoll vs. Springfield Township School District, 699 F.2d at 146-148. Four out of ten court of appeals judges voted for rehearing. Knoll, 699 F.2d at 146. Thomas also states that she relied on the Court of Appeals' later decision in Perri vs. Aytch, 724 F.2d 362 (3d Cir. 1983). The Court noted in Perri that a petition for certiorari had been filed in the Knoll case.

For the foregoing reasons, although we do not suggest that Thomas was not entitled to rely on the decisions of the

Court of Appeals' holding that a six-year statute of limitations applied to her claim, we conclude that in light of Thomas's initial failure to file suit within the limiations period applicable for over two years after her claim arose and the unsettled state of the law regarding the applicable statute of limiations prior to the Supreme Court's decision in Wilson vs. Garcia, retroactive aplication of Wilson vs. Garcia to bar Thomas's claim would not be harsh, unjust or inequitable. Consequently, Thomas's case is not legally distinguishable from Smith vs. City of Pittsburgh and Smith's holding regarding the retroactive application of Wilson vs. Garcia is appliicable to this case, thereby barring Thomas's claim.

NOW, THEREFORE, IT IS ORDERED THAT;

1. The Defendants' supplemental motion for summary judgment is granted.

2. The Defendants' original motions for a summary judgment are denied without prejudice as moot.

3. The Clerk of Court shall enter judgment in favor of the Defendants and against the Plaintiff.

4. The Clerk of Court shall send a copy of this order to Magistrate Smyser and close this file.

/s/ Muir

MUIR, U.S. District Judge

MM:cs

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DARLENE THOMAS, Plaintiff	:	CIVIL ACTION No. 84-0173
vs.	:	(JUDGE MUIR)
CRAIG WILLIS, et al., Defendants	:	(Complaint filed 2/6/84)

AFFIDAVIT OF DARLENE THOMAS

1. I, Darlene Thomas, am an adult individual, residing at 2626 Garfield Street, N.W., Washington, D.C. 20008, and am the Plaintiff in the above-captioned case.

2. Prior to filing the instant lawsuit I was advised and through personal research found that the Statute of Limitations in Pennsylvnia for such an action was six years as held by numerous decisions of the Third Circuit Court of Appeals.

3. In reliance on those cases I undertook the filing of the instant lawsuit and the commitment of the time and money necessary to prosecute same.

4. In order to prosecute this lawsuit through the date of the Supreme Court's decision in Wilson vs. Garcia, __U.S.__, 53 U.S.L.W. 4481 (April 19, 1985), I have done and/or incurred the following:

a) Legal fees incurred by me have been in excess of Thirty-one thousand dollars ($31,000).

b) Out-of-pocket costs for such things as court costs, deposition costs, travel

to this lawsuit have exceeded Two thousand, five hundred dollars ($2,500.00).

c) I have traveled from my apartment in Washington to Pennsylvania for meetings with my attorney on four separate occasions on October 5, 1983, October 17, 1983, December 19, 1983 and November 30, 1984.

d) I have traveled from my apartment in Washington to attend four separate days of depositions of the Defendants in Harrisburg on June 18, 19 and 20, 1984 and August 3, 1984.

e) I have traveled from my apartment in Washington to attend two days of depositions in Lock Haven, Pennsylvania, scheduled of me by the Defendants on October 25 and 26, 1984.

f) I have traveled on two separate occasions to two separate depositions of me in Harrisburg, Pennsylvania, scheduled

by the Defendants on December 3, 1984 and February 5, 1985.

g) I have given over one thousand pages of sworn testimony at depositions scheduled by the Defendants on the aforesaid dates.

h) Over 23 potential witnesses have been contacted by my attorney.

i) I have devoted in excess of 648 additional hours in telephone communications with my attorney, reviewing documents, legal research, and other preparation for the eventual trial in this case.

5. If I had not been advised and determined prior to the filing of this suit that the Statute of Limitations was six years in Pennsylvania as held by the Third Circuit and as stated in Paragraph 2 hereof, I would not have incurred the significant costs and expenses set forth herein, nor would I have devoted the sub-

stantial time, effort and energy which I have personally devoted to the continued prosection of this case.

I declare, under penalty of perjury, that the foregoing statements are true and correct.

Executed on May 22, 1985

/s/ Darlene Thomas